

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRIANNA BRUCE

Claimant

V.

PETRO STOPPING CENTERS

Respondent

AND

AMERICAN ZURICH INS. CO.

Insurance Carrier

Docket No. 1,068,734

ORDER

Respondent and insurance carrier (respondent) request review of Administrative Law Judge Brad E. Avery's March 26, 2014 Order. Bryce D. Benedict of Topeka, Kansas, appeared for claimant. D'Ambra M. Howard and Ryan D. Weltz of Overland Park, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the judge and consists of the transcript of the March 25, 2014 preliminary hearing and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

Judge Avery ordered claimant be evaluated by Edward J. Prostic, M.D., for his opinions regarding, *inter alia*, treatment recommendations, whether claimant's work activity was the prevailing factor causing her injury and need for treatment, and if claimant was at maximum medical improvement, what is claimant's functional impairment, if any. The Order did not address the compensability of the claim.

Respondent argues the judge exceeded his jurisdiction in ordering a neutral medical evaluation, including in asking Dr. Prostic to provide a functional impairment opinion. Respondent also asks the Board to determine claimant failed to prove compensability.

Claimant contends respondent's argument is moot, as Judge Avery issued an amended Order on April 14, 2014. Such amended Order omitted the prior request for Dr. Prostic to address claimant's functional impairment. Claimant also argues the Board lacks jurisdiction to address compensability because it was not ruled upon by the judge.

The only issue for Board review is: Does the Board have jurisdiction to review the preliminary hearing Order?

PRINCIPLES OF LAW & ANALYSIS

Respondent argues the judge exceeded his jurisdiction by requesting Dr. Prostic to address claimant's functional impairment because there were not at least two divergent medical opinions concerning claimant's functional impairment. This issue is moot based on the judge's amended order.

The Board's review of preliminary hearing orders is limited. The Board can review only allegations that a judge exceeded his or her jurisdiction,¹ including review of jurisdictional issues listed in K.S.A. 2013 Supp. 44-534a(a)(2): (1) did the worker sustain accidental injury or injury by repetitive trauma; (2) did the injury arise out of and in the course of employment; (3) did the worker provide timely notice; and (4) do certain other defenses apply. "Certain defenses" refer to defenses which dispute the compensability of the injury.²

The Board also only reviews "decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act . . . upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge."³

The judge issued an interlocutory order for an independent medical evaluation, which is within his authority under K.S.A. 2013 Supp. 44-516(a). The judge did not address compensability. The Board does not have jurisdiction to rule on issues not addressed by the judge.⁴ This Board Member declines respondent's request that the Board address compensability in advance of the judge doing so.

CONCLUSION

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member concludes: (1) the Board is without jurisdiction to entertain respondent's appeal of an interlocutory order; and (2) the Board is without jurisdiction to entertain the issue of compensability because no order to this effect was ruled upon by the judge. When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.

¹ K.S.A. 2013 Supp. 44-551(l)(2)(A).

² *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

³ K.S.A. 2013 Supp. 44-555c(a).

⁴ See *Mezquita v. Tyson Fresh Meats, Inc.*, No. 1,042,398, 2013 WL 4779974 (Kan. WCAB Aug. 16, 2013).

WHEREFORE, the undersigned Board Member dismisses respondent's appeal of the March 26, 2014 preliminary hearing Order.⁵

IT IS SO ORDERED.

Dated this _____ day of April 2014.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable Brad E. Avery

⁵ By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(I)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.